(18,571.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 343.

THE CONTINENTAL NATIONAL BANK OF MEMPHIS, TENNESSEE, PLAINTIFF IN ERROR,

vs.

G. C. BUFORD.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript from United States circuit court of appeals	a	1
Writ of error and clerk's return	1	1
Citation	2	2
Transcript from United States circuit court, eastern district of Arkansas	3	3
Complaint	3	3
Sections 1337, 1346, and 1347 of Sandels and Hill's Digest of the Statutes of Arkansas	4	4
Exhibit A—Note, Bank of Mammoth Springs to H. G. King, $1,150, May 20, 1897	6	6
B—Note, Bank of Mammoth Springs to Continental National Bank, $3,500, May 27, 1897	6	6
C—Statement of account, Bank of Mammoth Springs with Continental National Bank	8	8
Summons and marshal's return	10	9
Demurrer to complaint	11	10
Order designating Judge Rogers to hold court	11	11
Record entry of filing of demurrer to complaint	12	12
Order of submission of demurrer to complaint	12	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 1, 1903.

	Original.	Print
Opinion of supreme court of Arkansas in case of Nebraska National Bank vs. H. J. Walsh, administrator	13	12
Opinion of the court on demurrer to the complaint	19	18
Judgment, May 29, 1901	22	20
Petition for writ of error	22	21
Assignment of errors	23	21
Bond on writ of error	23	22
Order allowing writ of error	24	23
Acknowledgment of service of citation, &c	25	23
Clerk's certificate to transcript	25	23
Appearance for plaintiff in error	26	24
Appearance for defendant in error	26	24
Stipulation to omit briefs in transcript of record from printed record	27	25
Argument commenced	28	26
Order of submission	28	26
Opinion of United States circuit court of appeals	30	27
Judgment of United States circuit court of appeals	33	30
Petition for writ of error	33	31
Assignment of errors	34	31
Bond on writ of error	35	32
Writ of error and clerk's return	37	33
Citation	39	34
Clerk's certificate to transcript	40	35

a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit at the December term, 1901, of said court, begun and held at the United States court-house in the city of St. Louis, Missouri, on the first Monday in December, to wit: the second day of December, A. D. 1901, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: on the twentieth day of July, A. D. 1901, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the eastern district of Arkansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Continental National Bank of Memphis, Tennessee, was plaintiff in error, and G. C. Buford was defendant in error, which said transcript of record as printed pursuant to the stipulation of the parties for use of the court upon the hearing of said cause, is in the words and figures following, to wit:

1 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the circuit court of the United States for the northern division of the eastern district of Arkansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the May term, 1901, thereof, between Continental National Bank of Memphis, Tenn., against G. C. Buford, a manifest error hath happened, to the great damage of the said Continental National Bank of Memphis, Tenn., as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein gi' en, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, on or before the 12th day of August 1901, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and

according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twelfth day of June in the year of our Lord one thousand nine hundred and one. Issued at office in the city of Batesville, with the seal of the circuit court of the United States for the northern division of the eastern district of Arkansas, dated as aforesaid.

JOSEPH W. PARSE,
Clerk Circuit Court United States, Northern Division of the Eastern District of Arkansas.

Allowed by

JACOB TRIEBER, *Judge.*

2 *Return to Writ.*

UNITED STATES OF AMERICA, } ss:
Northern Division of the Eastern District of Arkansas, }

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court, at office in the city of Batesville, this 10th day of July, A. D. 1901.

[Seal of the Circuit Court, Northern Division, East. Dist. Arkansas.]

JOSEPH W. PARSE,
Clerk of said Court.

No. 3. United States circuit court, northern division of the eastern district of Arkansas. Continental Nat. Bank of Memphis, Tenn., *vs.* G. C. Buford. Writ of error. To the circuit court of the United States for the northern division of the eastern district of Arkansas. Filed 12 day of June, 1901. Joseph W. Parse, clerk.

The United States of America to G. C. Buford, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the northern division of the eastern district of Arkansas, wherein The Continental National Bank of Memphis, Tennessee is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Jacob Trieber, judge of the circuit court of the United States for the eastern district of Arkansas, this 12th day of June in the year of our Lord one thousand nine hundred and one.

JACOB TRIEBER,
United States District Judge for the Eastern District of Arkansas.

No. —. United States circuit court, northern division of the eastern district of Arkansas. Continental Nat. Bank of Memphis, Tenn., *vs.* G. C. Buford. Citation.

3 In the Circuit Court of the United States for the Northern Division of the Eastern District of Arkansas.

THE CONTINENTAL NATIONAL BANK OF MEMPHIS, TENN., Plaintiff,
vs.
G. C. BUFORD, a Resident of Fulton County, Arkansas, Defendant.

Complaint at Law.

The plaintiff sues the defendant upon the cause of action hereinafter stated, as follows:

It shows that it is a banking corporation chartered and organized in 1890 under the national banking laws of the United States, with its office and place of business in the city of Memphis, Tennessee. That it is now in liquidation, having retired from the active business of banking in April 1899.

That the defendant is a resident of the town of Mammoth Springs, Fulton county, Arkansas.

That on October 20th, 1889, the Bank of Mammoth Springs, a corporation with its place of business at the town of Mammoth Springs, Fulton county, Arkansas, was organized and chartered, with defendant as one of its incorporators, and one of its first board of directors.

That defendant remained a member of the board of directors of said Bank of Mammoth Springs from its organization until its cessation of business in July, 1897, during which month said institution, having been utterly and wholly insolvent for some years, suspended business and passed into the hands of a receiver.

That on June 9th, 1891, defendant was elected president of said Bank of Mammoth Springs, and continued to hold that office from that date until June 9th, 1896.

That on September 6th, 1894, said Bank of Mammoth Springs became indebted to plaintiff in the sum of $2500.00, by note for that amount due November 8th, 1894. That on said date said note was renewed, and upon maturity of said renewal it was likewise renewed. These renewals continued from time to time, with occasional payments at some of the times of renewal, until May 20th, 1897, when said Bank of Mammoth Springs being then indebted to plaintiff in

the sum of $1150.00 as balance due on said original indebtedness, executed to the plaintiff its note for that amount, due and payable three months after date with interest from maturity at the rate of six per cent. per annum. A true copy of said *not* is herewith
4 filed as Exhibit "A" and the original will be produced on or before the hearing, or at any other time called for.

That on May 3rd, 1894, said Bank of Mammoth Springs was also indebted to the plaintiff in the sum of $5,000.00 by note, which by the same process of renewals and part payments as above stated in regard to the first note was reduced on May 2nd, 1897, to $3,500.00, for which said Bank of Mammoth Springs executed to plaintiff its note for said amount, due ninety days after date with interest at the rate of six per cent. per annum. A true copy of said note is herewith filed, marked Exhibit "B," and the original will be produced on or before the hearing, or when called for. Said note is also entitled to further credits, as appears on the back thereof, amounting to $1592.75, leaving a balance due thereon of $1907.25, exclusive of interest. That in the years 1894 to 1897, inclusive, said bank was likewise indebted to plaintiff in various sums, at different times, due upon open account. That on June 30th, 1897, the balance due the plaintiff upon said account was $383.55, and in April 1898 when the last entry appears upon said account the balance was and now is, exclusive of interest, $2738.05. An itemized statement of said account from June 30th, 1897, is herewith filed as Exhibit "C."

Plaintiff therefore charges that said Bank of Mammoth Springs is justly indebted to it in the sums as hereinbefore stated, and that no part thereof has been paid except what is credited thereon. The said Bank of Mammoth Springs is wholly and totally insolvent, and its creditors can realize nothing on their debts.

The plaintiff was by the court appointing a receiver for said institution, denied the right to file its claim and participate in any distribution of assets that might be had, and that this denial was because of plaintiff holding certain collaterals, as shown on the face of the notes Exhibits "A" and "B" hereto.

Plaintiff states that said collaterals are wholly and totally worthless and can never be realized on.

That by section 1337 of Sandels & Hill's Digest of the Statutes of Arkansas, it is provided that:

"SEC. 1337. The president and secretary of every corporation organized under the provisions of this act, shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of making such certificate, in the following particulars, viz.: the amount of capital actually paid in; the cash value of its real estate; the cash value of its per-
5 sonal estate; the cash value of its credits; the amount of its debts; the names and number of shares of each stockholder; which certificate shall be deposited on or before the fifteenth day of February or of August with the county court clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

That by section 1346 of said Digest it is provided as follows:

"SEC. 1346. The certificates required by sections 1334, 1337, 1343 and 1344, except certificates of transfers of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts, he shall be deemed guilty of perjury, and be punished accordingly."

That by section 1347 of said Digest, it is provided as follows:

"SEC. 1347. If the president and secretary of any such corporation shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of such neglect or refusal."

That said Bank of Mammoth Springs was incorporated and organized under the provisions of the law as set forth in sections 1326 to 1258 inclusive of said Digest, and therefore was subject to all of its terms.

That during the whole time of his incumbency of the office of president of said Bank of Mammoth Springs,—that is from June 9th, 1891, until June 9th, 1896,—when as above stated he ceased to be president of said bank—said defendant wholly neglected to comply with the provisions and perform the duties required of him by said sections 1337 & 1346, by making, swearing to and causing to be filed the statement or certificate required thereby.

Plaintiff therefore charges that said defendant is by reason of the foregoing facts, liable to it in this action, founded upon said statute, for the amount of the indebtedness due it by said Bank of Mammoth Springs as hereinbefore set out.

Wherefore, plaintiff prays judgment of the court against defendant, for the amount of its debt as hereinbefore set out, with interest, and for other relief.

RHEA P. CARY,
Attorney for Plaintiff.

6 STATE OF TENNESSEE, }
County of Shelby. }

H. L. Armstrong makes oath in due form of law, that he is cashier of the plaintiff bank, and that he believes the statements of the foregoing complaint are true.

H. L. ARMSTRONG.

Subscribed and sworn to before me, this the 20th day of July, 1900.

[L. S.]

W. T. AVERY,
Notary Public.

My commission expires, Oct. 20th, 1901.

Bank of Mammoth Springs, Mammoth Springs, Arkansas.

$1,150.00. MAMMOTH SPRINGS, ARK., *May* 20, 1897.

Three months after date, we promise to pay to the order of H. G. King, eleven hundred & fifty dollars, at Continental national bank, Memphis, Tenn., for value received, with 6 per cent. interest from maturity until paid, and attached hereto as collateral security, sundry collaterals.

(Signed) BANK OF MAMMOTH SPRINGS.
H. G. KING, *Pres't.*

No. — Due —

Exhibit "A."

On back:

Protest waived and payment guaranteed.
(Signed) H. C. KING.

$3,500.00. MAMMOTH SPRINGS, ARK., *May* 27, 1897.

Ninety days after date we promise to pay to the order of the Continental National Bank of Memphis, Tenn., thirty-five hundred dollars, for value received, negotiable and payable without defalcation or discount at the Continental National Bank of Memphis, Tenn., with interest at the rate of six per cent. per annum from —, having deposited or pledged with the Continental National Bank of Memphis, Tenn., as collateral security for the payment of this note sundry collateral.

Now in the event of the non-payment of this note at maturity, the holder hereof is hereby invested with full authority to use, transfer, hypothecate, sell or convey the said collaterals, or any collaterals substituted for or added to the above, or any part thereof or to cause the same to be done, at public or private sale, with or without notice or demand of any sort, at such place and on such terms as the holder hereof may deem best, and the holder of this note is authorized to purchase said collaterals when sold for his own protection, and the proceeds of such sale, transfer or hypothecation shall be applied to the payment of this note, together with all protest, damages, in
7 terests, costs and charges due upon the note, or incurred by reason of its non-payment when due, or in the execution of this power. The surplus if any after payment of this note, together with all charges above stated, shall be paid to the drawer of this note, or at the election of the holder hereof be paid on any other obligation of the drawer hereof, whether as principal debtor or otherwise, held by the holder hereof, and if the proceeds of the above sale shall not be sufficient to pay this note, the drawer hereof agrees to make good (and) deficit. In case of depreciation in the market value of any security pledge, for this obligation, we hereby agree to deposit on demand, a further amount of collateral so that the market value shall always be at least ten per cent. more than the amount of this note, and failing to deposit such additional security, this note

shall be deemed to be due, and payable forthwith anything hereinbefore expressed to the contrary notwithstanding, and the holder may immediately reimburse himself by the sale of the security. It is further agreed that if at any time prior to maturity or payment of this note the undersigned becomes, or is believed by said bank to be insolvent, said bank, if then the holder thereof, shall be entitled as further security for the payment of this note to a first lien upon any draft or bills receivable it may then hold for the collection for the account of the undersigned and upon any money then deposited with said bank to the credit of the undersigned, and may retain and apply such money and proceeds when collected of all such drafts or bills receivable to the payment of this note.

(Signed) BANK OF MAMMOTH SPRINGS,
By H. G. KING, *Pres't*,
By GEO. READ, *Cashier*.

Exhibit "B."

On back:

CREDIT.

Oct. 5, '97.	Cash from note W. H. Woods		$500.00
Dec. 7, '97.	Brick sold	11.87	
" "	C. H. Fawcett, paid	20.00	
			31.87
" 15, '97.	R. W. Soosetre, paid		55.00
Jan. 5, '98.	Brick sold		30.00
Jan. 26, '98.	" "		50.00
Feb. 4, '98.	" "		27.50
" 14, '98.	Shays Co., warrant sold		287.50
Mar. 12, '98.	Brick sold		15.50
" 31, '98.	Bal. brick sold		595.38
	Total credits		$1,592.75

8 Bank of Mammoth Springs, Mammoth Springs, Arks., in account with Continental National Bank, Memphis, Tenn.

DEBIT.			CREDIT.		
1897.			1897.		
July 1.	R	1 95.	June 30.	By am't balance as per statement	383.55.
	10402	500.00.	July 1.	C. L. 30th	52.70.
		501.95.		1. "	52.54.
2.	R	6.			105.24.
	10412	14.50.		2. 1st	129.36.
	L. R. ret'd & fees	28.98.		3. 2nd	138.89.
		49.48.		6. 3	27.99.
6.	10404	62.65.		5	434.29.
	5	43.50.			462.28.
	6	64.80.		8. 7	213.34.
	7	5.94.		10. 9	754.24.
		176.89.		12. 10	1218.75.
7.	Rem. to Western B	100.		13. 12	173.83.
	10411	12.35.		14. Mer. bk. held	51.88.
	2	99.75.		C. L. 13	355.16.
	3	11.58.			407.04.
	8	25.50.		15. 14	1155.84.
	20	6.65.		16. Dep. by R. P. Lake	683.
	R	56.52.		C. L. 15	200.78.
		312.35.			883.78.
8.	10408	182.79.		17. 16	191.34.
	19	97.95.		19. 17	294.97.
		280.74.		17	998.00.
9.	10414	150.			1292.97.
	5	151.40.		20. Mer. held	36.30.
	22	1.40.		" "	24.75.
		302.80.		19	110.30.
10.	10409	26.55.			171.35.
	10	73.95.		21. C. L. 20	606.50.
	31	10.11.			690.87.
	2	11.41.			1297.37.
	3	5.10.		22. Mer. bk. paid	30.70.
	5	49.85.		24. Harrison Ark	875
	6	25.31		Less cost	120 7.55.
	8	33.84.		27. Our rem. 7-21	50.60.
	41	8.31.			
	2	53.93.		For'd	9068.02.
	4	2.90.			
	5	3.30.			
	6	17.65.			
		322.19.			
12.	10423	150.			
	4	500.			
	6	13.73.			
	7	21.13.			
	8	360.00.			
	9	109.50.			
	30	8.			
	4	133.60.			
	7	21.95.			
	40	191.82.			
	3	18.55.			
	9	7.			
	R	5.			
		1656.38.			
13.	Mer. bk. to notary	51.88.			
	10425	7.40.			
	8	46.13.			
	R	16.13.			
		121.54.			
9					
14.	Our rem	13.30.			
	R	9.25.			
		22.55.			
15.	10447	201.71.			
	53	50.09.			
	Guthrie 7-10 ret'd protested & fees	451.50.			
	R	10.00.			
		713.30.			
	For'd	4460.17.			

Exhibit "C."

(Account continued.)

DEBIT.			CREDIT.	
1897.			1897.	
Amount forwarded		4460.17.	July 27. By am't for'd	9068.02.
July 16. 10459	98.37.		1898.	
60	25.70.		April 14. Balance	2738.05.
6	30.10.			
R	178.38.			
		332.55.		
17. 10461	4.15.			
3	149.75.			
4	31.30.			
		185.20.		
19. 10454	1919.10.			
8	692.51.			
62	24.85.			
5	26.26.			
3552	3.00.			
R	29.16.			
Mer. bk. ref.	24.75.			
" " "	36.30.			
		2756.27.		
20. 10450	2.85.			
1	9.85.			
13	12.10.			
4	39.34.			
R	163.90.			
		228.04.		
21. Mer. bk. unpaid	30.70.			
10475	583.30.			
6	39.54.			
80	366.74.			
1	111.82.			
2	2.65.			
6	38.68.			
93	15.15.			
4	29.85.			
6	149.70.			
7	29.87.			
R	50.60.			
		1439.60.		
22. West Plains 7-19, ret'd	1000.00.			
R 7-19	5.00.			
		1005.00.		
26. K. C. 7-20 ret'd	500.00.			
fees	2.50.			
		502.50.		
27. Pipestone mine refused		840.00.		
1898.				
Jan. 22. P'd rent to K. C. Ft. & M. R. R.		5.00.		
Apr. 14. P'd M. Imp. & W. P. Co.		51.75.		
		11806.07.		11806.07.
April 28. To balance		2738.05.		

10 The foregoing complaint, and Exhibit- "A," "B" and "C" are endorsed on the back as follows:

The Continental National Bank, of Memphis, Tenn., *vs.* G. C. Buford. No. 33. Complaint at law. Filed in my office July 21, 1900. Joseph W. Parse, clerk.

Summons. Issued July 21, 1900.

The President of the United States of America to the marshal of the eastern district of Arkansas, Greeting:

You are hereby commanded to summon G. C. Buford of Mammoth Springs, Fulton county, Arkansas, a citizen of the State of Arkansas, if to be found in your district, to appear before the judges of the circuit court of the United States, in the eighth circuit for the

eastern district of Arkansas, at Batesville, Arkansas, in said district on the second Monday in December next, A. D. 1900, then and there to answer the Continental National Bank of Memphis, Tenn., a corporation under the national banking laws of the United States, in a plea of debt to the damage of said plaintiffs (as they say) fifty-seven hundred and ninety-five and $\frac{30}{100}$ dollars and interest ($5795.30).

Hereof fail not, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Batesville, this 21st day of July, A. D., 1900, and the 125th year of American Independence.

[L. S.] JOSEPH W. PARSE, *Clerk.*

I have executed the within writ by delivering a true copy of the same into the hands of G. C. Buford, at Mammoth Springs, on August 7th, 1900, as within I am commanded.

HENRY M. COOPER,
U. S. Marshal,
By JAMES F. HUDDLESTON,
Deputy U. S. Marshal.

Marshal's fees $5.96.

Indorsed on back: U. S. circuit court, northern division, eastern district of Arkansas. No. 23. Continental National Bank of Memphis *vs.* G. C. Buford. Summons issued July 21, 1900. Returnable Dec. term, 1900. Filed in my office Aug. 17th, 1900. Joseph W. Parse, clerk.

11 In the District Court of the United States, Northern Division of the Eastern District of Arkansas.

CONTINENTAL NATIONAL BANK OF MEMPHIS, TENN., Plaintiff,
vs.
G. C. BUFORD, Defendant.

The defendant demurs to the complaint of the plaintiff for insufficiency, and for cause of demurrer says:

1st.

That the said complaint shows on its face that the plaintiff's cause of action is barred by the statute of limitation of two years.

2nd.

That the said complaint shows on its face that the plaintiff's cause of action is barred by the statute of limitation of three years.

3rd.

That said complaint does not allege that defendant was president of the Bank of Mammoth Springs when the debt sued for was contracted.

4th.

That said complaint does not allege that the debts sued for were contracted during the period of defendant's neglect or refusal to file the certificate required by section 1337 of the Digest.

5th.

Because said complaint does not state facts sufficient to constitute a cause of action.

DAVIDSON & MEEKS,
Attorneys for Defendant.

On the back: Continental National Bank *vs.* G. C. Buford. No. 33. Demurrer. Filed Dec. 10th, 1900. Joseph W. Parse, clerk.

Order Designating Judge to Hold Court.

UNITED STATES OF AMERICA, }
Eighth Circuit. }

In my judgment the public interests require the designation and appointment of a district judge of this court to hold and assist in holding the circuit and district courts of the United States for the eastern district of Arkansas in place or in aid of the district judge of that district:

I do, therefore, by these presents, designate and appoint the Honorable John H. Rogers, United States district judge for
12 the western district of Arkansas, to hold or assist in holding the district and circuit courts of the United States in and for the several divisions of the eastern district of Arkansas at the times and places appointed by law for holding said courts from September 10th, 1900, until January 1st, 1901, in place or in aid of the Honorable Jacob Trieber, United States district judge for the said eastern district of Arkansas.

Witness my hand this 10th day of September, A. D. 1900.

WALTER H. SANBORN,
Circuit Judge.

Be it remembered, that on the 10th day of December, 1900, A. D., the same being the second Monday in December, the day fixed by law for the convening of the circuit court of the United States for the northern division of the eastern district of Arkansas, said court met in the United States court-room at Batesville, the place designated by law, the Hon. John H. Rogers, judge of the United States for the western district of Arkansas, presiding, none of the other judges of the eighth circuit being present; also being present Henry M. Cooper, marshal of the United States for the eastern district of Arkansas, and Joseph W. Parse, clerk of said court present. When after due proclamation court was opened and the following proceedings, had:

CONTINENTAL NATIONAL BANK OF MEMPHIS, TENN.,
vs.
G. C. BUFORD. } No. 33.

Now on this day comes the defendant and through his attorneys, Davidson & Meeks, files his demurrer herein.

TUESDAY, *December 11th, A. D.* 1900.

Hon. John H. Rogers, judge, presiding.

CONTINENTAL NATIONAL BANK OF MEMPHIS, TENN.,
vs.
G. C. BUFORD. } No. 33.

On this day comes the plaintiff by Rhea P. Cary, its attorney, and also the defendant by Davidson & Meeks, his attorneys, and the demurrer heretofore filed by the defendant to the plaintiff's complaint herein, was presented to the court, and after argument of counsel for the plaintiff as well as for the said defendant, the court doth take the matters of law arising on said demurrer under advisement and withholds a decision thereon for the present.

* * * * * * *

(Here follow the briefs of the plaintiff and defendant filed in the court below which are omitted by stipulation of the parties.)

13 STATE OF ARKANSAS, *sct:*

In the Supreme Court.

Be it remembered, that at a term of the supreme court of the State of Arkansas, begun and held on the 29th day, being the fourth Monday of May, A. D. 1900, at the court-house in the city of Little Rock, the following opinion was delivered by the court in the case of

NEBRASKA NATIONAL BANK, Appellant,
vs.
H. J. WALSH, Adm'r.

Appeal from Pulaski circuit court.

Opinion. Filed November 17th, 1900.

The statement and opinion in full follows:

Statement.

This is an action by appellant against appellee for the statutory liability arising upon the following sections of the Digest:

"SECTION 1337. The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first Monday of January or July next preceeding the time of making such certificate,

in the following particulars, viz: The amount of capital actually paid in, the cash value of its real estate, the cash value of its personal estate, the cash value of its credits, the amount of its debts, the name and number of shares of each stockholder, which certificate shall be deposited on or before the 15th day of February or August, with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"SECTION 1346. The certificate required by sections 1334, 1337, 1343 and 1344, except the certificate of transfer of stock, shall be made under oath or affirmation by the person subscribing the same, and if any person knowingly shall swear or affirm falsely as to any material facts he shall be deemed guilty of perjury, and be punished accordingly.

"SECTION 1347. If the president or secretary of any such corporation shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute, for all debts of such corporation contracted during the period of (ant) such neglect or refusal."

14 The defendant pleaded the statute of limitations. The case was tried before the court, which upon the evidence made the following finding:

"The court finds the facts as follows: The Southern Stave and Lumber Company was a corporation organized under the law of Arkansas, November 3rd, 1890. H. J. Walsh, the defendant, was president thereof till May 23, 1895. January 26, 1893, the Southern Stave and Lumber Company made its note of $10,000.00 to the Western Manufacturing Company, due May 29, 1893, which was before maturity duly transferred to plaintiff bank, March 29, 1893, Western Manufacturing Company made its note to plaintiff bank for $10,000.00, due August 1, 1893, and assigned to it as collateral security the note of Southern Stave and Lumber Company for $13,002.70, executed to said Western Manufacturing Company on the 4th day of March, 1893, due October 7th, 1893. None of these notes have been paid, but have been renewed from time to time, and the debts then created are represented by the notes in suit. The first certificate ever filed by the president as called for by section 1337 of Sandels & Hill's Digest was filed March 15, 1893, in the court-house of Pulaski county, Ark., the domicile of the corporation, and was not supported by affidavit, but contained only the certificate of the notary that it had been acknowledged as signed by the president and secretary. This suit was filed January 13, 1896, and a writ then issued, more (then) two years after the right of action accrued.

Finding of Law.

"On this state of facts the defendant became liable to the plaintiff for the debts sued on, which had their inception during the time of his default in filing his certificate.

"But the causes of action are barred by the statute of limitations

of two years, pleaded by the defendant, and the defendant is entitled to judgment and it is so ordered."

Judgment was entered accordingly, and this appeal duly prosecuted.

Opinion.

The statute upon which this action was founded does not come within the scope of the statute of limitations of two years. That statute is as follows:

"All actions upon penal statutes, where the penalty or any part thereof, goes to the State or any county or person suing for the same, shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued."

15 First. The prime object of making statutes strictly penal is to enforce obedience to the mandates of the law by inflicting punishment upon those who disregard them, and in statutes primarily and properly penal, the provision for punishment now rests in uncertainty, is never based upon a contingency. The general public is supposed to be injured by the violation of every penal statute, whether any special injury results to any particular individual or class of individuals or not. The punishment is provided as a sanction to the law, and is imposed for the public good, to deter others from like offenses. It would therefore be palpably incongruous to call a statute penal which did not contain a definite and certain provision for punishment in every case where the duty enjoined —it were ignored. Black's Law Dic., Penal Statutes, "Penal Laws," Bonner's Law Dic. "Penal Statutes," Potter's Diaries on Statutes and Constitution, 74. Reassured by these simple but infallable tests, the statute upon which this action is based is not penal. Here the behest of the law may be ignored repeatedly by the officers failing to *the* file the certificate required, and still no unpleasant or severe consequences would be visited upon them unless there were creditors who had debts contracted with the corporation during the period of such disobedience, and even then the officers could be made to pay only at the instance of these creditors and not by them if the debts had already been paid by the corporation. This shows conclusively that the public in general is not one whit interested in the enforcement of the duties enjoined by this statute and that punishment of the officers for failure to perform the duties it prescribed is not the dominant idea.

The duty which the statute enjoins upon, and the liability which it creates against the officers, is in favor of creditors. The measure of the liability is the amount of the debts which the corporation has incurred. There is no arbitrary amount fixed as a pecuniary mulct against the officers for each failure to file the certificate required. The amount is fixed, for compensation and indemnity, at the actual amount due the creditors. No additional sum is allowed them against the officers. They are only required to pay to prevent a loss which would otherwise result directly or indirectly from their negligence or failure. "By the principles of the common law," says Judge Thompson, "all men are answerable out of their estates for

the debts which they contract by themselves or their agents. Now, when the legislature says that the managing officers of a corporation shall not enjoy this granted immunity, provided they fail to make and publish certain reports to apprise the public of its financial condition, it is no more than to say to them that these things which it requires of them are conditions precedent upon which alone
16 they shall enjoy this granted immunity." Third Thompson Corp., sec. 4164; Nat. New Haven Bank *vs.* North Western Guaranty Loan Co., 61 Minn., 375. The liabilities created and the remedies provided by this statute are private and civil. There is nothing in the mere wording to give it even a penal semblance, which of itself, is persuasive. We conclude, from these considerations, that the statute is not penal, but highly remedial, even when construed independent of the statute of limitations. Second. But when viewed as we must view it here, in connection with that statute, the correctness of that conclusion seem- all the more obvious. The statute of limitations was modeled after the 31st of Eliz., chapter 5, section 5. According to the familiar rule which we have often followed, where a statute is borrowed from another jurisprudence where it has received definite construction, it is taken with the construction which had there been placed upon it. Up to 1838, when our statute of limitation was passed, penal statutes in England were limited to actions brought either for the Government by the public prosecutor, or to *qui tam* actions, brought not by the party injured or ag-rieved, but by any one else who prosecuted both for himself and the Queen—the common informer. *Qui tam pro domino Rege, quam pro se ipso in hac parte sequiter.*

But statutes which gave the remedy to the party aggrieved were never regarded as penal, but as remedial, even though such party might have been given damages beyond indemnity, or mere compensation:

Woodgate *vs.* Katchbull, 2 Tenn. Rep., 148.
Word *vs.* Snell, 1 Hy. Blackst., 10.
Bones *vs.* Booth, 2 W. Blackst., 1226.

But whether our statute was borrowed from England or not, it is very similar to 31st of Eliz., and the distinction *supra* between penal and remedial statutes under it was correct then, and under peculiar wording of our statute it is correct now. For, in our opinion, the phrascology of our statute indicates that the legislature had in mind only those statutes which imposed a pecuniary mulct for the doing or not doing of some act commanded or forbidden by the law for the benefit of the public and for which pardon might be granted, and for which the Government alone its designated agent or the common informer might bring an action. In other words, penal statutes, in the strict and proper sense, are not statutes creating private rights and remedies. The words "or other persons" mean simply any other person who sues as a common informer, and not having a special injury by reason of injury or grievance. The words "or cause of action shall have accrued" refer to those numerous
17 statutes where the cause of action does not accrue to the State or county until the common informer has been given an

opportunity to sue for the penalty or *vice versa*, or to cases where an opportunity is given to the offender to make compensation or restitution before he can be proceeded against. In all such cases, the cause of action accrues, of course, after the commission of the offense.

We are aware that there is quite an array of respectable authority holding that statutes similar to the one sued on here are penal and subject to the statutes of limitations for suits based upon penal statutes.

(See brief of counsel for appellee.)

Much depends, of course, upon the language of the respective statutes, as to the construction to be given them and the correct applications of the decisions construing them. Many New York cases are cited as authority for holding our statute penal. The New York limitation statute is as follows: "An action upon a statute for a penalty or forfeiture, when the action is given to the person aggrieved, or to the person and the people of the State, except where the statute imposing it prescribes a different limitation, shall be brought within the three years." Other cases based on statutes embodying similar language are cited. We do not consider cases based upon such statutes as in conflict with the view we have expressed, it matters not in what language the opinion may be couched. For the words " when the action is given to the person aggrieved " may have been considered by the court as tantamount to a legislative determination that actions by aggrieved parties to recover on statutes similar to ours were penal. With due deference to all authorities which hold that statutes similar to ours are penal, we are constrained to believe that such views are erroneous, and we fully agree with Mr. Morawetz that " it is not quite clear what the courts mean to express by saying that statutes of this character are penal and that they impose upon the directors a penal liability." 2 Mor. Corp. sec. 908.

That opinion is unusually clear and says what is expressed by the supreme court of Georgia, in the early case of Neal *vs.* Moultrie, 12 Ga. 116: Thomp. Cor.——

The opinion is unusually clear and strong. The following authorities also support the view we have taken:

Goodridge *vs.* Rogers, 22 Pick. 495.
Adams *vs.* Palmer, 6 Gray, 338.
Norfolk *vs.* Anur Steam Gas Co., 103 Mass., 160–162.
Nickerson *vs.* Wheeler, 118 Mass., 298.
18 Davidson *vs.* Rankin, 34 Cal. 505.
Mokelunne *vs.* Woodberry, 14 Cal. 265.
Cady *vs.* Sandford, 53 Vt. 632.
Seely *vs.* Smith, 45 N. W. 922.
Stanley *vs.* Wharton, 9 Price 301.
Marathon Bank *vs.* Jones, 47 N. W., 208.
Wolverton *vs.* Taylor, 23 N. E., 1007.
Fitzgerald *vs.* Weidenback, 76 Fed. Rep. 695.
Huntington *vs.* Aetvill, 146 U. S., 567.

The decision in the last case was put upon the ground that the statute under consideration was not penal in the international sense; (atill,) what is said in the opinion evidently supports the view we have expressed. The authorities above cited are all found in the brief of counsel for the appellant, and we may say in this connection that it would be a work of supererogation to attempt to go beyond the reasoning and research of the most excellent briefs of counsel on both sides. They seem to have exhausted the subject. We have agreed with the counsel for appellee, and this opinion couched in my own language, reflects, in the main, though in a less forceful and attractive form, the arguments they have presented.

Having reached the conclusion that this is a statutory liability and not a penalty, the statute of limitations would be that applicable to "all actions founded upon any contract, or liability, expressed or implied, not in writing." Sec. 4822, Dig. Rev. Stat. chap. 91, sec. 6. For before the forms of action were abolished, debt was the proper action for enforcing a statutory liability of the kind under consideration.

Lewis *vs.* Stein, 16 Ala. 214.
Ballard *vs.* Bell, 1 Mason, 243.
Stockwell *vs.* United States, 13 Wall., 531.
Chaffee *vs.* United States, 18 Wall., 516.
Cross *vs.* United States, 1 Gall., 26.
Reed *vs.* Davis, 8 Pick., 514.
Rockwell *vs.* State, 11 Ohio, 130.
Blackburn *vs.* Baker, 7 Port, 284.
Strange *vs.* Powell, 15 Ala., 452.
Kelly *vs.* Davis, 1 Head, 284, 18 Am. & E. Ency. Law, 274; Wood on Limitations, sec. 25.

The finding of facts by the court being correct there is no reason for sending the cause back for a retrial. The judgment of
19 the circuit court is reversed for the error in finding the action barred by the two years' statute of limitations and judgment is entered here for the appellant.

In testimony that the above is a true copy of the opinion of the supreme court, in the case therein stated, I, P. D. English, clerk of said court, hereto set my hand and affix the seal of said court at my office, in the city of Little Rock, this the 5th day of December, A. D. 1900.

[L. S.]

P. D. ENGLISH, *Clerk*,
By J. H. CAMPBELL, *D. C.*

In the Circuit Court of the United States for the Northern Division of the Eastern District of Arkansas.

CONTINENTAL NATIONAL BANK OF MEMPHIS, TENN., Plaintiff,
vs.
G. C. BUFORD, Defendant.

ROGERS, *J.:*

This suit is a statutory proceeding, founded on sections 1337 and 1347 of Sandels & Hill's Digest of the Statutes of Arkansas, which reads as follows:

"SECTION 1337. The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or July next preceding the time of making such certificate, in the following particulars, viz: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the name and number of shares of each stockholder, which certificate shall be deposited on or before the 15th day of February or August, with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"SECTION 1347. If the president or secretary of any such corporation shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of any such neglect or refusal."

No authority need be cited to establish so plain a proposition as that where a suit is founded on a statute the pleader must state a case clearly within its terms. The preliminary question, therefore, is to clearly understand the meaning of the statute. What does section 1337 of Sandels & Hill's Digest require of the president and secretary of domestic corporations in this State?

Answer:

First. To make a certificate.

Second. To make it *annually.*

Third. It must show the *condition* of the (*of the*) corporation in certain particular *specified in the statute* (and omitted here because not necessary to state them).

Fourth. The *condition* of the corporation required to be shown is its condition either "on the first Monday of January or July next before the time of making such certificate."

Fifth. If the certificate made shows the condition of the corporation on January 1st, next before it was made, it must be deposited with the county clerk on or before the 15th day of February next thereafter.

Sixth. If the certificate made shows the condition of the corporation on July 1st next before is was made, it must be deposited with

the county clerk on or before the 15th day of August next thereafter.

It is clear then, if this is a correct construction of that section, that the officers may elect whether in the certificate, they will show the condition of the corporation on January 1st or July 1st, provided always, in each year, when possible, one certificate must be made, but if they elect to make the certificate show the condition of the corporation on January 1st, it must be made and deposited with the county clerk on or before the 15th of February next thereafter; and if they elect to make the certificate show the condition of the corporation on July 1st, the certificate must be made and deposited on or before August 15th next thereafter. This is important, because when the time has expired in which the law requires the certificate to be made and deposited, the liability of the officers attaches; and all debts contracted between that time and the time the next certificate is required to be made and deposited they are personally liable for, and any person having such a debt may sue upon it at any time after the liability attaches. Difficulties will be found in applying this construction of the statute to supposable cases. They will be found, however, in any construction that may be placed upon it. The difficulties are inherent in the language of the statute. We know, however, that the certificate required is to be made "*annually*" and "*annually*" does not mean "twice in one year" but it means "yearly" or "once in each year." Holding on to this definition of the word "annually" it seems to me no other construction is possible without disregarding some parts of the section, which is not permissible so long as a construction is possible which will permit all to stand.

Now, let us turn to the complaint. In the first place, there
21 is not a single allegation in the complaint which informs us when either of the three debts sued for was "*contracted.*" But the officers of the Bank of Mammouth Springs are not personally liable for any debts of that bank, except such as were "contracted during the period of any such neglect or refusal" to make and deposit the required certificate. But it may be said the following allegation appears as to the first debt: "That on September 6, 1894, said Bank of Mammoth Springs *became indebted* to plaintiff in the sum of twenty-five hundred dollars, by note for that amount, due November 8, 1894." Assuming that the words "became indebted" are tantamount to "contracted," then how does plaintiff stand? It is alleged and must be taken as true, that the defendant became president of the Bank of Mammoth Springs on June 9, 1891, and continued president until June 9th, 1896, and never did make or deposit (and) of the required annual certificates. As to this debt, his last failure or refusal, before it was contracted occurred on August 15, 1894, and the failure or refusal continued until this debt was contracted. His liability for this debt, therefore, begun the moment it was contracted, and continued three years, which would be September, 1897.

This debt, therefore, is clearly barred by the three years' statute of limitations. Nebraska National Bank *vs.* Walsh, 68, Ark. If it be

said that debt was renewed from time to time, and the last note therefor executed on May 20, 1897, there are two answers: first, a renewal of a note is not the contraction of a debt. It is simply the execution of a new note as evidence of a debt previously contracted. Plaintiff's brief contains citations which, I think, conclusively establish this proposition. Secondly, if the execution of the renewal note of May 20, 1897, was the contraction of the debt within the meaning of the statute, then the answer is, defendant ceased to be president in June, 1896, and the times provided by the statute for making and depositing two certificates had occurred, after he ceased to be president, and before the note was executed.

What I have now said is applicable with even more force to the second note, for as to that there is no allegation as to when the debt was contracted, or any language tantamount thereto. The language is, the Bank of Mammoth Springs "was also indebted," etc. That allegation may be true, and yet the debt have been contracted ten years before. The same is true as to the open account. The allegations do not bring it within the terms of the statute. It does not appear that a single item of it was contracted while the defendant was president of the bank. The complaint, therefore, does not show any cause of action; and, if it did, it appears, affirmatively
22 that the debts are barred by the three years' statute of limitation.

The demurrer, therefore, should be sustained, with leave to amend.

JNO. H. ROGERS,
U. S. District Judge.

Be it remembered, that on the 27th day of May, A. D. 1901, the same being the fourth Monday in May, the day fixed by law for the convening of the circuit court of the United States for the northern division of the eastern district of Arkansas, said court met in the United States court-room at Batesville, the place designated by law, the Honorable Jacob Trieber, judge of the United States for the eastern district of Arkansas, presiding, none of the other judges of the eighth circuit being present.

Also being present Henry M. Cooper, marshal of the United States for the said district, and Joseph W. Parse, clerk of said court, present; when after due proclamation said court was opened and the following proceedings had:

WEDNESDAY, *May 29th, A. D.* 1901.

CONTINENTAL NATIONAL BANK
vs.
G. C. BUFORD. } No. 33.

On this day the court being well advised what order to make on the demurrer to the bill, filed by defendant and submitted to the court at the former term of this court, the court doth sustain the demurrer, and complainant declining to amend his bill, but electing to rest on said original bill, it is therefore ordered, adjudged and

decreed by the court, that the complainant's bill be dismissed, and that the defendant do have and recover of and from the complainant all his costs herein expended, for which execution may issue as at law.

JOHN H. ROGERS,
Judge by Assignment.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Arkansas.

CONTINENTAL NATIONAL BANK
vs.
G. C. BUFORD.

Comes the plaintiff, The Continental National Bank, and says that on or about the 29th day of May, 1901, this court entered judgment herein in favor of defendant and against this plaintiff, sustaining the demurrer of said defendant, and dismissing plaintiff's
23 suit; that error was committed by the court in sustaining the demurrer and dismissing plaintiff's suit; all of which will more fully appear from the assignment of error which is filed with this petition.

Wherefore, plaintiff prays that a writ of error may issue in this behalf to the United States circuit court of appeals for the eighth circuit at St. Louis, for the correction of errors complained of, and that a transcript of the record herein may be sent to said circuit court of appeals.

RHEA P. CARY,
Attorney for Plaintiff.

Indorsed on back: Continental National Bank *vs.* G. C. Buford. Petition for writ of error. Filed June 11th, 1901. Joseph W. Parse, clerk.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Arkansas.

CONTINENTAL NATIONAL BANK
vs.
G. C. BUFORD.

The plaintiff, in connection with its petition for a writ of error herein, tenders the following assignment of errors to the action of the court upon the hearing of the demurrer of the defendant herein:

1st. The court erred in entering judgment in favor of the defendant and against the plaintiff, sustaining the demurrer of the defendant and dismissing the plaintiff's suit.

2nd. The court erred in holding that the action was barred by the statute of limitations of Arkansas of three years.

3rd. The court erred in not holding that the renewals of indebt-

edness sued on were but continuations of the same debt, and that the statute of limitations did not begin to run until the maturity of the last renewal.

RHEA P. CARY,
Attorney for the Plaintiff.

Indorsed on back: Continental National Bank *vs.* G. C. Buford. Assignment of errors. Filed June 11th, 1901. Joseph W. Parse, clerk.

Know all men by these presents: That we, The Continental National Bank, of Memphis, Tenn., as principal, and J. S. Handford, as surety, are held and firmly bound unto G. C. Buford, in the full and just sum of three hundred dollars to be paid to the said G. C. Buford, his heirs, executors, administrators or assigns; to
24 which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 7th day of June, 1901.

Whereas, lately at the May term, 1901, of the circuit court of the United States for the northern division of the eastern district of Arkansas, in a suit pending in said court between The Continental National Bank, plaintiff, and G. C. Buford, defendant, judgment was rendered against the said Continental National Bank, plaintiff as aforesaid, and the said plaintiff, The Continental National Bank, has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, G. C. Buford, citing and admonishing him to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Mo., sixty days from and after the date of said citation.

Now the condition of the above obligation is such that if the said Continental National Bank shall prosecute said writ of error to effect and answer all damages and costs if it fail to make good its plea, then the above obligation shall be void, otherwise to remain in full force and virtue.

THE CONTINENTAL NATIONAL BANK
OF MEMPHIS, TENN.,
By RHEA P. CARY, *Attorney.*
J. S. HANDFORD, *Surety.*

Approved by
JACOB TRIEBER,
U. S. District Judge, Eastern (—) of Arkansas.

On back: Filed June 13th, 1901. Joseph W. Parse, clerk.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Arkansas.

CONTINENTAL NATIONAL BANK
vs.
G. C. BUFORD.

Now comes the plaintiff, by its attorney, and files herein its petition for a writ of error to the United States circuit court of appeals for the eighth circuit to be holden at St. Louis, together with its assignment of errors in such behalf, to review the judgment rendered herein on May 29th, 1901, the prayer of which said petition is hereby granted and the writ of error awarded upon plaintiff giving bond in the sum of $300.00, or paying said sum into the registry of this court, the former of which is accordingly done, and said writ of error will issue as prayed for, returnable in 60 days.

JACOB TRIEBER,
U. S. Judge, East. Dist. Arkansas.

25 Indorsed on back: Continental National Bank *vs.* G. C. Buford. Order of court granting writ of error. Filed June 13th, 1901. Joseph W. Parse, clerk.

In the Circuit Court of the United States, Northern Division of the Eastern District of Arkansas.

CONTINENTAL NATIONAL BANK
vs.
G. C. BUFORD.

As attorneys for G. C. Buford, the defendant herein, we acknowledge notice of appeal and service of copies of petition for writ of error, assignment of errors, and citation by this court.

DAVIDSON & MEEKS,
Attorneys for Defendant.

Indorsed on back as follows: "Continental National Bank *vs.* G. C. Buford. Acknowledgment of service of copies and notice of appeal. Filed in my office, June 23rd, 1901. Joseph W. Parse, clerk."

In the Circuit Court of the United States for the Northern Division of the Eastern District of Arkansas.

CONTINENTAL NATIONAL BANK, Plaintiff,
vs.
G. C. BUFORD, Defendant. } No. 33.

I, Joseph W. Parse, clerk of the circuit court of the United States of America, of the eighth judicial circuit, in and for the northern division of the eastern district of Arkansas, do hereby certify the foregoing forty-nine pages, numbered from 1 to 49 inclusive, to be a full

true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $23.50, and that said amount was paid by Rhea P. Cary, attorney for plaintiff in error.

The Seal of the Circuit Court, U. S. A., Northern Division of East. Dist., Ark.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court, this 26th day of June A. D. 1901.

JOSEPH W. PARSE,
Clerk United States Circuit Court, Northern Division, Eastern District of Arkansas.

(Cancelled 10c. U. S. rev. stamp.)

Filed Jul- 20, 1901.

JOHN D. JORDAN, *Clerk.*

26 (*Appearance for Plaintiff in Error.*)

And on the twentieth day of July, A. D. 1901, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

CONTINENTAL NATIONAL BANK OF MEMPHIS, Plaintiff in Error, *vs.* G. C. BUFORD. } No. 1621.

The clerk will enter my appearance as counsel for the plaintiff in error.

RHEA P. CARY.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1621. Continental National Bank of Memphis, plaintiff in error, *vs.* G. C. Buford. Appearance. Filed Jul- 20- 1901, John D. Jordan, clerk. Rhea P. Cary, Memphis, Tenn., counsel for pl'ff in error.

(*Appearance for Defendant in Error.*)

And on the thirteenth day of August, A. D. 1901, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CONTINENTAL NATIONAL BANK OF MEMPHIS, TENNESSEE, Plaintiff in Error,
vs.
G. C. BUFORD. } No. 1621.

The clerk will enter my appearance as counsel for the defendant in error.

ROBERT NEILL.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1621. The Continental National Bank, plaintiff in error, *vs.* G. C. Buford. Appearance. Filed August 13, 1901, John D. Jordan, clerk. Robert Neill, Batesville, Ark., counsel for def't in error.

27

(*Stipulation to Omit Briefs in Transcript of Record from Printed Record.*)

And on the thirteenth day of August, A. D. 1901, a stipulation to omit briefs in transcript of record from printed record was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

In the Circuit Court of Appeals of the United States for the Eighth Circuit.

CONTINENTAL NATIONAL BANK OF MEMPHIS
vs.
G. C. BUFORD. } #1621.

In this cause, it is hereby stipulated and agreed between counsel for both parties hereto, that the clerk of this court in printing the record of this cause, may, and he is hereby, authorized to omit from the printed record, the briefs of counsel used in the lower court, and certified in the record by the clerk of that court.

RHEA P. CARY,
Attorney for Plaintiff in Error.
DAVIDSON & MEEKS,
ROBERT NEILL,
Attorneys for Defendant in Error.

(Endorsed:) No. 1621. Continental National Bank, pl'ff in error, *vs.* G. C. Buford. Stipulation to omit briefs in transcript of record from printed record. Filed Aug. 13, 1901, John D. Jordan, clerk.

(*Argument Commenced.*)

And on the seventh day of January, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an entry in said cause, in the words and figures following, to wit:

28 United States Circuit Court of Appeals, Eighth Circuit, December Term, 1901.

TUESDAY, *January* 7, 1902.

CONTINENTAL NATIONAL BANK OF MEMPHIS, TENNESSEE, Plaintiff in Error, *vs.* G. C. BUFORD. } No. 1621.

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Rhea P. Cary in behalf of the plaintiff in error; but the argument not having been concluded at the hour of adjournment, the further hearing of this cause was postponed until tomorrow morning.

(*Order of Submission.*)

And on the eighth day of January, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1901.

WEDNESDAY, *January* 8, 1902.

CONTINENTAL NATIONAL BANK OF MEMPHIS, TENNESSEE, Plaintiff in Error, *vs.* G. C. BUFORD. } No. 1621.

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause having been called this day to be further heard, argument was continued by Mr. Rhea P. Cary for plaintiff in error and by Mr. Robert Neill for the defendant in error and concluded by Mr. Rhea P. Cary for the plaintiff in error.

Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

29 (*Opinion.*)

And on the twelfth day of March, A. D. 1902, an opinion of said circuit court of appeals was filed in said cause, in the words and figures following, towit:

30 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1901.

THE CONTINENTAL NATIONAL BANK of Memphis, Tennessee, Plaintiff in Error,
vs.
G. C. BUFORD, Defendant in Error.

No. 1621. In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. Rhea P. Cary for the plaintiff in error.

Mr. Robert Neill (Messrs. Davidson & Meeks were with him on the brief) for the defendant in error.

Before Caldwell, Sanborn and Thayer, circuit judges.

Statement.

The Bank of Mammoth Springs was an Arkansas corporation located at Mammoth Springs in that State. On the 9th day of June, 1891, G. C. Buford, the defendant in error and defendant below, was elected president of the bank and continued to be such until the 9th day of June, 1896. A statute of Arkansas under which the bank was organized and which was in force during the period mentioned contains the following provisions:

"SEC. 1337. The president and secretary of every corporation organized under the provisions of this act, shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of making such certificate, in the following particulars, viz: The amount of capital actually paid in: the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the names and number of shares of each stockholder; which certificates shall be deposited on or before the 15th day of February or of August with the county court clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"SEC. 1346. The certificates required by sections 1334, 1337, 1343 and 1344, except certificates of transfers of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts, he shall be deemed guilty of perjury, and be punished accordingly.

"SEC. 1347. If the president and secretary of any such corpora-

tion shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such cor-
31 poration contracted during the period of such neglect or refusal." Sandels & Hill's Digest of the Statutes of Arkansas.

This action was commenced July 21st, 1900. The complaint alleges that during the whole time the defendant was president of the bank he neglected to comply with the requirements of the foregoing provisions of the statute by making, swearing to and depositing the certificate required thereby. It further alleges: "That on September 6th, 1894, said Bank of Mammoth Springs became indebted to plaintiff in the sum of $2500, by note for that amount due November 8th, 1894. That on said date said note was renewed, and upon maturity of said renewal it was likewise renewed. These renewals continued from time to time, with occasional payments at some of the times of renewal, until May 20th, 1897, when said Bank of Mammoth Springs being then indebted to plaintiff in the sum of $1150.00 as balance due on said original indebtedness, executed to the plaintiff its note for that amount, due and payable three months after date.

"That on May 3rd, 1894, said Bank of Mammoth Springs was also indebted to the plaintiff in the sum of $5,000.00 by note, which by the same process of renewals and part payments as above stated in regard to the first note was reduced on May 2nd, 1897, to $3,500.00, for which said Bank of Mammoth Springs executed to plaintiff its note for said amount, due ninety days after date."

The defendant demurred to the complaint on the ground that it appeared on the face of the complaint that the cause of action was barred by the statute of limitations. The circuit court sustained the demurrer and the plaintiff declining to plead further final judgment was rendered for the defendant and the plaintiff sued out this writ of error. The opinion of the circuit court is reported in 107 Fed. Rep. 188.

CALDWELL, circuit judge, after stating the case as above, delivered the opinion of the court:

It is settled by the decision of the supreme court of Arkansas in the case of the *Nebraska National Bank v. Walsh*, 68 Ark. 21, that the statute on which this action is founded is a remedial statute and imposes "a statutory liability and not a penalty," and that the three years' statute of limitations applies to actions founded thereon. The single question left for our consideration is, When did the plaintiff's cause of action against the defendant accrue?

The contention of the plaintiff in error is that it did not accrue until the maturity of the last renewal notes; the contention of the defendant is that it accrued when the debts sued for were contracted, or at the furthest, on the maturity of the notes given at the time the indebtedness was created. The complaint does not disclose when the debts sued for were contracted, but they must have been contracted on or before May 3rd, 1894, and September 6th, 1894, the

respective dates at which the first notes mentioned in the complaint were executed.

As the action is barred whether the statute of limitations commenced to run from the creation of the debt or from the maturity of the notes given at its creation, it is not essential to the decision of the case to determine whether when the plaintiff made a loan to the Bank of Mammoth Springs or otherwise became its creditor for a present consideration on an agreed term of credit and took a note accordingly, the plaintiff could the next day have brought
32 suit for the amount of the debt against the defendant on his statutory liability to pay it as a debt of the bank "contracted during the period" of his neglect and refusal to file the required certificate.

Under the statute the defendant did not sustain to the debtor bank the relation of a joint principal, surety or guarantor. His liability was primary and not secondary. It was created by statute and was not contingent upon the failure or inability of the bank to pay, but was absolute and unconditional. It resulted from his dereliction of official duty and if he had been compelled to pay the debt he would have had no right of reclamation or indemnity from the bank. The statute imposed upon him the obligation of a principal debtor for his refusal and neglect to perform a duty enjoined upon him by law for the protection of the public. His legal liability for the debt was fixed and perfect the moment it was contracted, without regard to the solvency or insolvency of the bank or to any proceedings against it to enforce payment.

At the time when the first renewal notes were taken the debt and the original notes given therefor had then become due and payable. The renewal of the notes operated as an extension of time for the payment of the debts by the bank but did not release the defendant either from his statutory liability to pay the debts or from immediate action therefor. As soon as the original notes became due and payable, if not before, the defendant was liable. The defendant was unquestionably then liable to an action and so was the bank. These two rights of action in the plaintiff were not dependent. They were concurrent and independent. The plaintiff could assert either or both. The assertion of one would not preclude the assertion of the other. Suspending the assertion of the one would not preclude the assertion of the other. Nothing but satisfaction of the plaintiff's debt by the pursuit of one would take away its right to follow the other. If, therefore, the right of action against the defendant on his statutory liability did not accrue on the creation of the debt it unquestionably did on its maturity, and the statute having once commenced to run could not thereafter be suspended so far forth as concerned the defendant, by any action of the plaintiff and the bank which might have that effect as between them. Without pursuing the subject further, we may say that we concur in the opinion of Judge Folger in *Jones v. Barlow*, 62 N. Y. 202, 213, and have in substance adopted its reasoning; it seems to have been followed in later cases in that State (*Hardman v. Sage*, 124 N. Y. 25; *Parrott v. Colby*, 6 Hun. 55, affirmed on appeal in 71 N. Y. 597; *Jagger Iron Co. v. Walker*,

76 N. Y. 521) and elsewhere—*Mokelumme Hill Canal Co. v. Woodbury*, 14 Cal. 265; *Davidson v. Ranken*, 34 Cal. 503; *Hyman v. Coleman*, 82 Cal. 650; *Young v. Rosenbaum*, 39 Cal. 646.

The complaint counts on an open account also, touching which it is only necessary to say that that portion of the account contracted while the defendant was president is clearly barred and for that portion of the account contracted after he ceased to be president, he never was liable.

The judgment of the circuit court is *affirmed*.

Filed March 12, 1902.

33 (*Judgment.*)

And on the twelfth day of March A. D. 1902, in the record of the proceedings of said circuit court of appeals is a judgment in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1901.

WEDNESDAY, *March* 12, 1902.

THE CONTINENTAL NATIONAL BANK OF MEMPHIS, TENNESSEE, Plaintiff in Error,
vs.
G. C. BUFORD. } No. 1621.

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Arkansas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs; and that G. C. Buford have and recover against the Continental National Bank of Memphis, Tennessee, the sum of twenty dollars for his costs herein and have execution therefor.

March 12, 1902.

(*Petition for Writ of Error.*)

And on the ninth day of May, A. D. 1902, a petition for writ of error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Circuit, at St. Louis, Missouri.

CONTINENTAL NATIONAL BANK
vs.
G. C. BUFORD.

34 Comes the plaintiff, The Continental National Bank and says, that on March 12, 1902, this court entered judgement herein in favor of defendant and against the plaintiff, affirming with costs the judgement of the lower court heretofore rendered herein; that error was committed by said court in so affirming said judgment of said circuit court, and in adjudging costs against this plaintiff, all of which will more fully appear from the assignment of errors, which is filed with this petition.

Wherefore said plaintiff, Continental National Bank prays that a writ or error may issue in this behalf to the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record herein may be sent to said Supreme Court of the United States.

RHEA P. CARY,
Att'y for Plaintiff.

(Endorsed:) No. 1621. Continental National Bank of Memphis, plaintiff in error, *vs.* G. C. Buford. Petition for writ of error. Filed May 9, 1902. John D. Jordan, clerk.

(*Assignment of Errors.*)

And on the ninth day of May, A. D. 1902, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Circuit, at St. Louis, Missouri.

CONTINENTAL NATIONAL BANK
vs.
G. C. BUFORD.

The plaintiff, Continental National Bank in connection with its petition for a writ of error, herein, tenders the following assignment of errors to the action of the circuit court of appeals upon the hearing of this cause in said court.

1. The court erred in entering judgement in favor of the defendant and against the plaintiff, affirming the judgement of the circuit court of the United States for the eastern district of Arkansas.
35 2. The court erred in adjudging the sum of $20.00 costs in favor of the defendant and against the plaintiff.
3. The court erred in holding that this action was barred by the statute of limitations of Arkansas of three years.
4. The court erred in not holding that the renewals of indebtedness sued on were but continuations of the same debt, and that the statute of limitations did not begin to run until the maturity of the last renewal.

RHEA P. CARY,
Att'y for Plaintiff.

(Endorsed:) No. 1621. Continental National Bank of Memphis, plaintiff in error, *vs.* G. C. Buford. Assignment of errors. Filed May 9, 1902. John D. Jordan, clerk.

(*Bond on Writ of Error.*)

And on the ninth day of May, A. D. 1902, a bond on writ of error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

Know all men by these presents, that we The Continental National Bank of Memphis as principal, and H. L. Armstrong and —— ——, as sureties, are held and firmly bound unto G. C. Buford in the full and just sum of three hundred ($300.00) dollars, to be paid to the said G. C. Buford, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of April, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a term of the United States circuit court of appeals for the eighth circuit, being the December term, 1901, in a suit depending in said court, between The Continental National Bank of Memphis, as plaintiff and G. C. Buford as defendant a judgment was rendered against the said The Continental National Bank of Memphis and the said The Continental National Bank of
36 Memphis having obtained an order for a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said G. C. Buford citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Continental National Bank of Memphis shall prosecute said writ of error to effect, and answer all damages and costs if it

fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE CONTINENTAL NATIONAL BANK
OF MEMPHIS,
By RHEA P. CARY, *Its Attorney.* [SEAL.]
H. L. ARMSTRONG. [SEAL.]
W. P. HALLIDAY. [SEAL.]

Sealed and delivered in presence of

——— ———.

May 5, 1902.

Approved by
DAVID J. BREWER,
Associate Justice of the Supreme
Court of the United States.

I hereby certify that the sureties upon the foregoing bond are solvent and amply good for the penalty thereof.

JOHN B. CLOUGH, [SEAL.]
Clerk U. S. Circuit Court,
Western District of Tennessee.
DAN. F. ELLIOTTE, *D. C.*

This the 3rd day of May, A. D. 1902.

(Endorsed:) No. 1621. Continental National Bank of Memphis, plaintiff in error, *vs.* G. C. Buford. Bond on writ of error. Filed May 9, 1902. John D. Jordan, clerk.

(*Writ of Error.*)

And on the ninth day of May, A. D. 1902, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between The Continental National Bank of Memphis, Tennessee, plaintiff in error, and G. C. Buford, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record

and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of May, in the year of our Lord one thousand nine hundred and two.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 1621. Continental National Bank of Memphis, plaintiff in error, *vs.* G. C. Buford. Writ of error. Filed May 9, 1902. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In witness whereof, I hereto subscribe my name and affix the seal of the United States circuit court of appeals for the eighth circuit, at office in the city of St. Louis, Missouri, this fifteenth day of May, A. D. 1902.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

38 (*Citation.*)

And on the ninth day of May, A. D. 1902, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

39 UNITED STATES OF AMERICA, *ss:*

To G. C. Buford, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days

from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Continental National Bank of Memphis, Tennessee, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this fifth day of May, in the year of our Lord one thousand nine hundred and two.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 1621. Continental National Bank of Memphis, Tenn., pl'ff in error, *vs.* G. C. Buford. Citation. Filed May 9, 1902. John D. Jordan, clerk.

40 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing forty pages contain a true copy of the portions of the transcript of the record printed pursuant to the stipulation of the parties and upon which record said cause was heard, and full, true and complete copies of all pleadings, proceedings and record entries, including the opinion of said circuit court of appeals, in a certain cause wherein The Continental National Bank of Memphis, Tennessee, was plaintiff in error, and G. C. Buford was defendant in error, No. 1621, December term, 1901, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original writ of error with my return thereto and the original citation are hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of said circuit court of appeals, at the city of St. Louis, Missouri, in the eighth circuit, this fifteenth day of May, A. D. 1902.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 18,571. U. S. C. C. of appeals, 8th circuit. Term No. 343. The Continental National Bank of Memphis, Tennessee, plaintiff in error, *vs.* G. C. Buford. Filed June 2nd, 1902.